National Research Journal of Banking and Finance Management
Volume No: 8, Issue No: 1, Year: 2021 (January-June)
PP: 1-7
ISSN No: 2349-6762 (Print)
Peer Reviewed & Refereed Journal
National Research Journal

A PERSPECTIVE ON SINGLE ECONOMIC ENTITY IN THE CONTEXT OF INSOLVENCY LAW IN INDIA

Ambar Zahra

Served in Ministry of Finance GoI as Consultant International Economic Affairs and Various Other Prestigious National and International Organizations & Doctorate in Economics from Jawaharlal Nehru University, Delhi

Introduction

While the mainstream economic thought throws light upon the inadequacy of resources to full fill the unlimited wants, the mainstream legal thought has the central problem of inadequacy of freedom to pursue economic interest meaning fully.[1]

A firm needs freedom at three stages of business, free entry into the market, free competition and free exit. This freedom ensures optimum utilization of resources in the economy. The first stage ensures allocation of resources to the most efficient use, the second stage ensures efficient use of resources allocated, and the third stage ensures release of resources from inefficient uses.

In India the Companies Act, 2013, The Competition Act 2002 and the Insolvency and Bankruptcy Code (IBC) 2016, are the three most important pillars of legislation that empower the central government to regulate the formation, financing, functioning and winding up of companies.

While the Company Act 2013 belongs to the rules and regulations that lead to the first stage of business activities i.e. free entry into the market, Competition ACT 2002 deals with the rules and regulations that provide freedom to the enterprise to continue his business, the IBC 2016 insures release of inefficient resources from market through its resolution and liquidation mechanism.

The Code provides such a market mechanism for (a) rescuing a failing, but viable firm; and (b) liquidating an unviable one and releasing its resources, including entrepreneur(s), for competing uses, and thereby provides the freedom to exit, the ultimate freedom. Presently the IBC provides for a variety of plans for the resolution of individual stressed companies only. However, it does not envisage a framework to either synchronise insolvency proceedings of different corporate debtors in a group or resolve their insolvencies together. However, in the insolvency resolution of some corporate debtors, including Videocon, Era infrastructure, Lanco, Educomp, Amtek, Adel, Jaypee and Aircel, special issues arose from their interconnections with other group companies. In some of these cases, the Adjudicating Authority (AA) under the Code i.e., National Company Law Tribunal (NCLT) as well as the Supreme Court, in some cases, have passed orders to partially ameliorate some such issues. This highlights the need to examine the desirability and feasibility of having a group insolvency framework.

In this background, the Insolvency and Bankruptcy Board of India ("IBBI") constituted a 'Working Group on Group Insolvency' ("WG"). The WG considered the need for a framework to facilitate the insolvency resolution and liquidation of companies in a group. Recently the Working Group on Group Insolvency (WG) submitted its report on Group Insolvency Framework". Its noted that the insolvency law, like general company law, respects the principle of a company as a separate legal personality, consequently, the insolvency of different Corporate Debtors (CD) belonging to the same group is dealt with separate insolvency proceedings for each CD. The report cautioned that the prevalence of corporate groups calls for modification to the principles of treating companies within a group as completely separate entities and recommends to treat the group of companies as Single Economic

[1] Sahoo, M.S. (2019), A Journey of Endless Hope, in Insolvency and Bankruptcy Board of India, A Miscellany of Perspective, IBBI, New Delhi

ISSN No: 2349-6762 (Print)
Peer Reviewed & Refereed Journal
National Research Journal

Entity (SEE) based upon the two parameter control and ownership, as it would result in maximisation of value of the insolvent company without destroying the value of the company being included.

Though the WG report suggests that for the purpose of the group insolvency, a corporate group should largely include holding, subsidiary and associate companies, as defined under the Companies Act, 2013.

It also recommends that giving some discretionary power to the adjudicating authority to include companies that are so intrinsically linked as to form part of a 'group' in commercial understanding but are not covered by the definition of the corporate group above. The report has not elaborated about the situation under which "group of companies" would be considered as a Single Economic Entity (SEE) that is an integral part of the competition laws across the nations. This doctrine goes beyond the globally recognised company laws where a company is recognised as a separate legal entity.

Under this background this article seeks to: i. understand the Single Economic Entity Concept (ii) examine the SEE doctrine under competition laws of US and EU and (iii) address common questions and misconceptions regarding the implications of this doctrine in India Competition ACT 2002 and (iii) highlight the feasibility of this doctrine for IBC Code under the Group Insolvency Framework and challenges ahead.

Single Economic Entity (SEE) Doctrine

The way in which European Union (EU) and United States (US) competition laws have interpreted the concept of SEE in their respective jurisdiction reflects that the concept is not defined in their respective statutes but is derived based on economic consideration.

These laws confer rights as well as impose obligations upon the economic actors who are responsible to perform economic activities in such a way that protect the welfare of the consumers and prohibits the anti-competitive agreement Different countries have different terms for these actors. EU refers them as undertakings, US applies the term "persons" whereas in India in the Competition Act 2002 these actors are defined as "Enterprise". Regardless of the words used to define the economic actors in a particular jurisdiction there is a global recognition regarding the significance of Single Economic Entity (SEE) Doctrine.

Under the SEE doctrine it is presumed that under certain circumstance different stakeholders act as one irrespective of their separate legal identity. As per the international standard two entities that belong to the same business group with a common objective are recognised as a SEE under competition laws. And so, agreements between such entities are not viewed as anti-competitive. It is a double-edged concept. On the one hand it provides defence for business (defensive dimension) and on the other hand it serves as a prosecutorial device for competition authorities.

SEE Doctrine in US Anti-Trust Law

In US glimpses of the single entity claims are reflected in the Section 1 and Section 2 of the 1890 Sherman Antitrust Act. Section 1 infringements requires at least bilateral action.

According to Section I of the Act *"every contract, combination in the form of a trust or otherwise, or, conspiracy, in restraint of trade' is prohibited. Every 'person' or firm engaging in restraining behaviour shall be subject to criminal and administrative penalties."*[2] Section 2 of the Act on the other hand, prohibits individual 'persons' or firms to engage in monopolization.

In US single entity claims have been considered in light of the *per se/rule of reason*/quick look trichotomy. Under the *per se* prohibition economic analysis has no role to play on the other hand in the *rule of reasons* analysis economic logics are taken into consideration. Whereas *quick look* analysis represents analytical compromise between the *per se* and *rule of reason* approaches.

[2] As quoted in Pieter Van

ISSN No: 2349-6762 (Print)
Peer Reviewed & Refereed Journal
National Research Journal

In US Copperweld Corp. v Independence Tube Corp Case (1984) was an important case regarding SEE where *the court held that,*

"*A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousness, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the parent's benefit. If the parent and subsidiary "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests. In reality, the parent and subsidiary always have a "unity of purpose or a common design".*[3]

Following divergent case law interpretations on the scope of single entity, the Supreme Court revisited and clarified its analysis in the important 2010 ***American Needle, Inc. v. National*** Football League judgment where National Football League (NFL) comprising of 32 companies, contended that their organization is a single entity. Here the Suprepme Cosurt held that for the purposes of marketing and selling their intellectual property, the thirty-two teams under the auspices of the NFLP were not a single entity and therefore, the NFL was not a single entity. It held that NFL teams are distinct economic actors with separate economic interests that are capable of conspiring under Section 1 of the Sherman Act. The NFL do not possess the "unitary decision-making quality" required and therefore, the Supreme Court didn't place reliance on the single entity theory.

At present, in the United States, competition authorities are reluctant regarding parent company liability for antitrust infringements by subsidiaries. Parent companies face penalties only in case of their direct involvement in an antitrust infringement. US courts support the principle of limited shareholder liability and usually prone to reject claims that are raised against parent companies also in private antitrust suits. Here parent companies have been held liable in antitrust cases based upon corporate law doctrines of piercing the corporate veil in rare cases. Generally, we can say parent company liability simply does not exist in US antitrust law.[4]

The case laws judgements depicted above reflect that in US being parent subsidiary relations is not the only condition for constitution SEE, what is more important is the unity of economic interest in such a way that does not conflicts with anti-competitive agreements prescribed in the laws.

SEE Doctrine in EU Competition Law

The concept of SSE was foremost introduced in the European Commission Guidelines, Treaty on the Functioning of European Union (TFEU) on horizontal cooperation, which states that companies which are part of the same "undertaking" within the ambit of Article 101(1) are not considered to be competitors under the guidelines. The Article 101 applies only to the agreements between independent undertakings. A scenario when a company exercises a decisive effect over another company, they are said to form a single economic entity & therefore are the part of same undertaking.[5]

Following its landmark decision in *Imperial Chemical Industries v. Commission (1972*),[6] the European Court of Justice holds parent companies liable for antitrust infringements by their subsidiaries under the 'single economic entity doctrine'. On this basis, the European Commission, as the primary public enforcer of EU competition law, frequently imposes fines on parent companies, even if they are not directly involved in their subsidiaries' antitrust infringements.[7]

[3] Supra Note 8
[4] CARSTEN Koenig (2018), Comparing Parent Company Liability in EU and US Competition Law, Website: https://awards.concurrences.com/IMG/pdf/final_version_woco_41_0104.pdf?46958/d0e4290339eb01ddc9dc2667f12ec1680d52817f
[5] K Shiva , Curtailing cartelisation through single economic entity doctrine, SSC Online Blog (Available at: https://blog.scconline.com/post/2018/02/06/curtailing-cartelisation-single-economic-entity-doctrine/,
[6] Imperial Chemical Industries v. Commission, 48/69, ECLI:EU:C:1972:70.
[7] Supra Note5

ISSN No: 2349-6762 (Print)
Peer Reviewed & Refereed Journal
National Research Journal

There is a rebuttable presumption under EU competition law that, where a parent company has a 100% shareholding in a subsidiary, whether held directly or indirectly, that the parent and subsidiary are a single economic unit[8]

The above para reflects that control rights, business interests and market conduct within and among different affiliated businesses have been the major determinant of single economic status in EU.

To conclude we can say While US Antitrust law gave more attention to the defensive dimension of Single Entity the EU Competition Law is dominated by the prosecutorial dimension.[9]

SEE and the Competition ACT 2002, India:

Just as European Competition rules are addressed against "Undertaking" US Antithrust Law has used the term "person" the Indian Competition law provides for a definition of what is an enterprise.[10]

Section 3 of the Competition Act prohibits the anti-competitive agreements among the enterprise or association of enterprise determining the purchase or sale prices, agreement to limit supply or production, sharing market or source of production, collusive bidding or bid rigging. This section further prohibits tie-in agreement, exclusive supply agreement, and exclusive distribution agreement, agreement on refusal to deal and agreement on resale price maintenance.

According to Chapter 2 of the Competition Act, 2002 the scope and ambit of Section 3 extends only over the agreements entered into among two or more enterprise, association of enterprise, persons, group of persons or person and enterprise. It reflects that the agreements under the purview of Single Economic Entity ate exempted from Section 3 of the Competition Act.

A cursory view of CCI's judgements on SSE cases [11] it dealt with, reveals that Competition Commission in most of the cases relied upon the decision of international case laws regarding the claim for SEE. It did not conduct its own analysis as the following literature review reflects.

Literature Review

Since till now CCI has dealt with few numbers of cases regarding SEE claim few literature is available on this issue some of them are mentioned below to critically analyse the present scenario and further challenges.

Raghunandan, G (2017)[12] in her paper on the implication of Single Economic Entity Doctrine in India examined the issue regarding supervisory control verses regulatory control under Public Insurer Case and concluded that the decisions of the CCI and the COMPAT showed that a common

[8] Case C-97/08 *Akzo Nobel NV v Commission* [2009] ECR I-08237 ("Akzo Nobel"), paragraph 60.
[9] Single entity tests in U.S. antitrust and EU competition law, Pieter Van Cleynenbreugel, (available at https://orbi.uliege.be/bitstream/2268/201655/1/SSRN-id1889232.pdf last accessed on 25/10/2019 at
[10] As per the s (2)h of Competition Act 2002,

"*Enterprise means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.*"

[11] 1. Shamsher Kataria v Honda Siel Cars & Ors (Case No. 03/2011
. 2. Exclusive Motors Pvt Limited v Automobili Lamborghini SPA (Case no. 52 of 2012),
3. Delhi Jal Board v Grasim Industries Ltd & ors, Case No.s. 03 & 04 of 2013
4. Grasim Industries Limited and Aditya Birla Chemicals (India) Limited, Competition Commission of India, Combination Registration No. C-2015/03/256
5. National Insurance Co Ltd (Case no. 02 of 20140

[12] Raghunandan G (2017), Website: http://competitionlawblog.kluwercompetitionlaw.com/2017/05/31/case-defence-single-economic-entities-cartelisation-insurance-companies-india/?print=pdf

ISSN No: 2349-6762 (Print)
Peer Reviewed & Refereed Journal
National Research Journal

shareholder, management or enterprise would not be sufficient for the SEE defence to apply. It is evident that the defence of "single economic entity" will be gauged on a transaction basis and not on an entity basis.

Jain (2018)[13] in his work reviewed the Public Insurers case on Single Economic Entity in India attempted to examine the extent to which Competition Act 2002 contemplated exclusion of Single Economic Entity doctrine by analysing the veracity of the submission that the insertion of the definition of enterprise does away with the requirements needed to prove the existence of a single economic entity.

He concluded that SEE doctrine's requirements could not be replaced by the requirements of definition of enterprises as it would equal to extracting over substance. Another issue that he tried to raise is weather government departments could have subsidiaries and recommended to amend the Competition Act 2002 accordingly with a view that non-inclusion of such amendment might lead to differential treatment of private and public enterprises.

Buland M (2018)[14] in his paper attempted to examine the evolution of SEE Doctrine in India especially by referring to European cases and the US cases. He further critically analysed that whether the current applicability of SEE doctrine in India is adequate or not. He observed that CCI requires decisive influence and supporting indicators to invoke the single economic entity doctrine and concluded that competition law authorities must tread with alert and depend on confirmations of economic synergy that originate before the supposed anticompetitive lead.

Cursory view of literature reflects that the Competition Law in India is not in line with international jurisprudence because both the U.S. and the EU are very clear in the implication of SEE doctrine. While US is more inclined towards defensive dimension, EU is consistent with parent subsidiary relation further in both the jurisdictions if there is a single economic entity, there is no question of a cartel based on the premise that one cannot have an agreement with oneself .

Further it can be said that there is an element of uncertainty and inconsistency in the CCI's approach when dealing with the SEE doctrine and the CCI does not have a fixed template for analysing the applicability of the SEE doctrine, which may differ according to the facts of the case.

Feasibility of SEE doctrine under the Insolvency and Bankruptcy Code (IBC):

Highlighting upon the importance of SEE in the IBC for timely resolution and value maximization during group insolvency resolution process the Working Group on Group Insolvency in its report submitted:

" If group companies operate jointly as a single economic entity, it may be important for "investors to get first-hand information about the group as a whole for taking an informed decision for investment" in a company in the corporate group."[15]

The reported further pointed out that against the general expectation that creditors and all other stakeholders would have chosen to deal with (and monitor) each company in a group as separate legal entities, with its own assets and liabilities., the stakeholders consulted by the WG submitted that in some cases stakeholders, such as creditors tend to treat group companies as single economic entities as long as it can be demonstrated that this will result in maximisation of value of the insolvent company without destroying the value of the company being included, so that there is overall value maximisation.

The WG recommends that to assess the applicability of the framework defining "Group" is a prerequisite. Given this, the WG recommends that this framework be made applicable to a 'corporate

[13] Jain, C. (2018), Single Economic Entity Doctrine in India, Indian Competition Law Review, Vol. III [May 2018] Website: http://www.iclr.in/assets/pdf/6.pdf
[14] Mahwesh Buland (2018) International Journal of Law Management & Humanities, **Volume 2, Issue 1 | ISSN: 2581-5369 Website :**
[15] IBBI (2019) Report of the Working Group on Group Insolvency Website: https://www.ibbi.gov.in/uploads/resources/d2b41342411e65d9558a8c0d8bb6c666.pdf

ISSN No: 2349-6762 (Print)
Peer Reviewed & Refereed Journal
National Research Journal

group' that is defined to include holding, subsidiary and associate companies. As prescribed in the Companies Act 2013.

While the Companies Act, 2013 does not define a group company, it defines holding and subsidiary companies based on a relationship of control.

The WG recommends that an application may be made to the Adjudicating Authority to include companies that are so intrinsically linked as to form part of a 'group' in commercial understanding, but are not covered by the definitions above, as long as it can be demonstrated that this will result in maximisation of value of the insolvent company without destroying the value of the company being included, so that there is overall value maximisation.

Cursory view of the WG Report on group insolvency reflects that before introducing the SEE doctrine in the IBC the group need to work upon the SEE concept itself as in its recommendation it has mentioned about the company interlined based upon the commercial understanding to be included under the proposed framework but the report has not elaborated the "commercial understanding". Further it has not prescribed which dimension of SEE would be more effective defensive or procedural one. It need to consult with the CCI and discuss the issues in details based upon the CCI judgements on SEE cases till dates and the challenges faced.

Conclusion and Recommendations

The paper reveals that none of the competition laws provides equivocal definition of Single Economic Entity at international plethora. This means that when dealing with some practical cases, the stakeholders need to engage in a thorough discussion on whether a group of companies should be treated as a single economic entity or not.

The studies presented above reflect that the court practice in India is not clear enough on the application of the criteria concerning determination of a single economic entity. In most disputes with the CCI, when the parties aimed to prove that separate entities constitute a single economic entity, they failed to do so. One of the reasons is a lack of a clear-cut theoretical and practical approach towards proving of a single economic entity under the India competition law.

It calls for revisiting the definitions of terms like groups, company, undertakings, enterprises, mergers, cartels, and so on and critically analyse the interwoven relationship among the economic as well as legal stakeholders. Further in light of the international perspective the stakeholders in India should also focus on the type of analysis required i.e. *Rule of reason* or *Per say* approach or *Quick look* analysis to deal with the case. Further the need is to draw a clear line between the legal entity and economic entity as legal entity comes under the purview of company law and economic entity is a subject matter of competition law.

Though the Working Group on Group Insolvency has taken a bold step by considering corporate group as a single economic entity under its group insolvency framework based on only two determinants i.e. control and ownership it needs further elaboration and apart from the Company Act 2013 definition of a holding and subsidiary company what is more important to examine whether a group constitute a single economic entity or not is to assess there *unity of interest* as the international cases discussed above reveal that it may be the case that there are holding companies with subsidiaries claiming themselves as SEE but the plea was rejected as they have separate economic interests. Further defining decisive influence is a grater challenge as real control and decisive influence may occur in many ways.

In a case where a domestic company is under the decisive control of an international company in such a case it becomes necessary to examine the competition, company as well as insolvency law of the other country also to solve the issue.

To conclude it can be said that realizing the importance of the implication SEE doctrine all the stakeholders belonging to Company Law, Competition Law and Insolvency Law should come forth to define the term in the laws as it would provide the authorities the freedom to solve such cases based on a proper analysis, rather than just relying upon for decision on international jurisdictions on such

ISSN No: 2349-6762 (Print)
Peer Reviewed & Refereed Journal
National Research Journal

case laws. Once it is done , then only we can think of a developed nation with fare market environment as well as with ease of exit through the insolvency laws. It would help the start ups also to dare to enter into the market without fear of insolvency and would help to India in achieving its target of 5 Billion Economy.